question the exercise of the discretion in the absence of evidence that the Board of Directors had acted mala fide.

For the above reasons we allow the appeal with costs here and below. Deposit to be refunded to the appellant.

Appeal allowed.

Solicitors: *Shearn Delamore & Co; Shook Lin & Bok.*

Reported by *Prof Ahmad Ibrahim*

Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 01-39 OF 1989
LEE HUN HOE CJ (BORNEO), MOHAMED AZMI AND JEMURI SERJAN SCJJ
20 AUGUST 1990

Administrative Law — Natural justice — Breach — Disciplinary action against civil servant — Show cause letter sent to civil servant including charge — Whether necessary to give grounds — Public Services Commission taking into account civil servant's past conduct without giving her opportunity of being heard — Public Officers (Conduct and Discipline) (General Orders Chapter 'D') Regulations 1969, regs 27 & 30 — Federal Constitution, art 135(2)

Constitutional Law — Natural justice — Breach — Disciplinary action against public officer — Federal Constitution, art 135(2)

In this case the appellant, a book-binder with the Government Printing Department, was dismissed by the Public Services Commission after she was found guilty of negligence and dereliction of duty. She subsequently applied to the High Court for a declaration that her dismissal was null and void and for other ancillary orders. Her application was dismissed in the High Court and she appealed. The core of the appellant's complaint was the fact that the Public Services Commission in arriving at its decision to dismiss her from service had taken into account extraneous matters, namely, the appellant's record of past conducts which were entered in her record of service and produced by the Director-General of the Government Printers Department to the Public Services Commission without giving her an opportunity to explain, contradict or rebut them.

Held, allowing the appeal:

(1) Although the show cause letter included a charge and not the grounds as required by reg 30(2) of the Public Officers (Conduct and Discipline) (General Orders Chapter 'D') Regulations 1969, this was a matter of form rather than of substance. The charge contained all the necessary grounds for the proposed dismissal which enabled the appellant to prepare her written representation in reply.

(2) The first respondent had infringed the rule of natural justice in not affording the appellant the opportunity to explain or controvert her record of service which played a part in influencing its decision to impose the severest punishment permissible under the 1969 Regulations. On this ground and based on the authorities cited in the judgment, the court had no alternative but to allow the appeal.

[Bahasa Malaysia summary

Di dalam kes ini, perayu, seorang penjilid buku dengan Pejabat Pencetak Kerajaan, telah dibuang kerja oleh Suruhanjaya Perkhidmatan Awam selepas ia didapati bersalah cuai dan mengabaikan tugas. Dia telah kemudiannya memohon kepada Mahkamah Tinggi untuk mendapat deklarasi bahawa pembuangan kerjanya itu adalah tidak sah dan terbatal dan untuk perintah-perintah bersampingan. Permohonannya telah ditolak di Mahkamah Tinggi dan dia telah merayu. Intisari aduan perayu ialah bahawa Suruhanjaya Perkhidmatan Awam apabila membuat keputusan untuk membuang kerjanya telah mengambil kira perkara-perkara tidak tergolong iaitu rekod kelakuannya dahulu yang telah dicatatkan di dalam rekod perkhidmatannya dan yang telah dikemukakan oleh Ketua Pengarah Pejabat Pencetak Kerajaan kepada Suruhanjaya Perkhidmatan Awam tanpa memberinya peluang untuk menjelas, menyangkal atau menafikan perkara-perkara itu.

Diputuskan, membenarkan rayuan itu:

(1) Sungguhpun surat meminta memberi sebab yang diberi kepada perayu mengandungi tuduhan dan bukan alasan-alasan seperti yang disebut di dalam Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) (Perintah-Perintah Am Bab 'D') 1969, ini adalah perkara bentuk dan bukan perkara pokok. Tuduhan itu mengandungi semua alasan yang perlu untuk pembuangan kerja yang dicadangkan yang membolehkan perayu menyiapkan jawapan bertulisnya.

(2) Responden pertama telah melanggar kaedah keadilan asasi oleh kerana tidak memberi perayu peluang menjelas atau menafikan rekod perkhidmatannya yang telah digunakan dan berkesan menyebabkan keputusannya untuk mengenakan hukuman yang seberat-beratnya yang dibenarkan di bawah Peraturan-Peraturan 1969 itu. Atas alasan ini dan atas autoriti-autoriti yang disebutkan di dalam penghakimannya, mahkamah tidak ada pilihan lain selain daripada membenarkan rayuan itu.]

Cases referred to

1 *Surinder Singh Kanda* v *Government of the Federation of Malaya* [1962] MLJ 169 (folld)
2 *R Sambasivam* v *Public Services Commission & Anor* [1971] 2 MLJ 181 (refd)
3 *Inspector-General of Police & Anor* v *Alan Noor bin Kamat* [1988] 1 MLJ 260 (refd)
4 *Board of Education* v *Rice* [1911] AC 179 (refd)
5 *Council of Civil Service Unions & Ors* v *Minister for the Civil Service* [1955] 1 AC 374 (refd)
6 *Mahadevan* v *Anandarajan & Ors* [1970] 1 MLJ 50 (refd)
7 *Ridge* v *Baldwin* [1964] AC 40 (refd)
8 *R* v *Smith* (1844) 5 QB 614 (refd)
9 *S Nanjundeswar* v *State of Mysore* AIR 1960 SC 159 (folld)
10 *R* v *Home Secretary, ex p Benwell* [1985] 1 QB 544 (folld)
11 *Ramachandra Gopalrao* v *Deputy Inspector General of Police* AIR 1957 Madh 126 (folld)
12 *Chief Constable of North Wales Police* v *Evans* [1982] 3 All ER 142 (refd)
13 *Board of Trustee of Maradona Mosque* v *Badiuddin Mahmud & Anor* [1967] AC 13 (refd)
14 *R* v *Deputy Industrial Injuries Commissioner, ex p Jones* [1962] 2 QB 677 (refd)

15 *Fairmont Investments Ltd* v *Secretary of State for the Environment* [1976] 1 WLR 1255 (refd)

Legislation referred to

Federal Constitution art 135(2)

Public Officers (Conduct and Discipline) (General Orders Chapter 'D') Regulations 1969 regs 27, 30

Appeal from: Civil Suit No P320 of 1981 (High Court, Kuala Lumpur)

Karpal Singh for the appellant.

Mohd Yusuf bin Johar Ali (Senior Federal Counsel) for the respondents.

Cur Adv Vult

Jemuri Serjan SCJ (delivering the judgment of the court): Shamsiah bte Ahmad Sham, a book-binder with the Government Printers Department in Kuala Lumpur was dismissed by the Public Services Commission, Malaysia ('the Commission'), after she was found guilty of negligence and dereliction of duty. Dissatisfied with the decision she commenced an action in the High Court Kuala Lumpur on 21 September 1981 seeking a declaration that her dismissal as a book-binder was null and void, inoperative and of no consequence, that she was still a member of the General Public Services of the Federation and that therefore she should be reinstated as a book-binder on the same salary. She also sought for an order that an account be taken of all salaries, emolution and other benefits lawfully due to her from the date of her purported dismissal and the same be paid to her with interest at the rate of 6% pa on the adjudged sum from the date of judgment to the date of realization and costs.

In the High Court, the appellant made several assertions against the Public Services Commission. She claimed that in deciding to dismiss her the Commission took into account prejudicial and extraneous materials without giving her a reasonable opportunity to rebut the allegations which were brought to the notice of the Commission behind her back. She also averred that the Commission was biased against her for having been apprised of the prejudicial material which had influenced it in its deliberations. It was contended that the grounds upon which the first respondent intended to take disciplinary action against the appellant in accordance with reg 30(2) of the Public Officers (Conduct and Discipline) (General Orders Chapter 'D') Regulations 1969 should be stated instead of proffering charges against her in the show cause letter dated 26 March 1979 and that in view of these material irregularities she was absolved from having to reply to the said show cause letter. It was further contended that art 135(2) of the Federal Constitution was infringed in that she was not afforded an opportunity to present her views on punishment before the punishment was imposed on her. Under the circumstances the punishment, therefore, violated the rules of natural justice. At the trial of the action the appellant was the sole witness called to give evidence while the respondents called no witness.

At the end of the trial the High Court in a very short judgment found that the Commission in coming to its decision had not in any way acted ultra vires or mala fides and there was no evidence to suggest that the Commission was biased or prejudiced against the appellant. The learned judge was satisfied that the appellant's conduct was not satisfactory as she had several disciplinary actions taken against her in the past and that the Commission was entitled to take into consideration the appellant's previous conduct. Because she had failed to prove her case the suit was dismissed.

In the appeal before us, counsel for the appellant complained of the unsatisfactory way the judgment was written in that the judgment was sketchy, unreasoned and an unspeaking judgment as one of the grounds of appeal. In view of our conclusion in this appeal we do not consider this complaint was so serious as to amount to an injustice. We would therefore not deal with this ground at length but suffice it to say that the judgment did not in any way prejudice the appellant's case in this appeal. The allegation that the first respondent took into account prejudicial extraneous matters against the appellant, namely, the appellant's past conduct without giving the appellant an opportunity of being heard in violation of the principles of natural justice is, however, such a serious matter as to decide the ultimate outcome of this appeal. Bias was also raised as a ground of appeal together with breach of reg 27. These last two grounds, however, were not very seriously pursued.

After hearing the submissions of both counsel for the appellant and the respondents, we were convinced there were merits in the appellant's contention in respect of the breach of the rules of natural justice and we therefore allowed the appeal with costs here and below and granted the declarations and order in terms of prayers 1 to 4 in the statement of claim but we would make no order as to interest. The order of the High Court be set aside. The deposit was to be refunded to the appellant.

We indicated we would reserve the reasons for our decision to a later date. Here are the grounds of our decision.

The matter arose in this way. The appellant was appointed on 1 April 1973 as a book-binder on probation for three years and was confirmed on 1 April 1979. She took and passed the departmental examination in practical book-binding on 1 March 1977. By a letter dated 26 March 1979 from the first respondent, the appellant was asked to show cause why she should not be dismissed from service pursuant to reg 30(3) of the Public Officers (Con-

duct and Discipline) (General Orders Chapter 'D') Regulation 1969. The said letter in so far as it is relevant for our consideration in this appeal was written in Bahasa Malaysia the translation of which in English appeared in the statement of claim as follows:

> Reasons for dismissal from service
>
> It is hereby informed that this commission has received a report on you from the Director General of the Government Printers Department, Peninsular Malaysia, Kuala Lumpur. This commission on carrying its duty as the disciplinary board has decided to take disciplinary action against you by dismissing you from services in accordance to rule 30, of Public Services (Conduct and Discipline) (General Orders Chapter 'D') 1969, on the following charge:
>
> > 'That you Shamsiah bte Ahmad Shah, employed as a book-binder in the Government Printing Department, Kuala Lumpur have been found to be negligent and not diligent in your duty by not completing all the duty dockets given to you in the specific time as stated in the Appendix 'A'. Your lack of diligence has resulted in financial loss to the Government. Your irresponsible behaviour is against rule 3(h), of the Rules of Public Officers (Disciplinary and Conduct) (General Order Chapter 'D') 1969, whereby disciplinary action with a view to your dismissal can be taken pursuant rule 30.'
>
> 2 Apart from that, it has been observed that several disciplinary actions have been taken against you by the Board of Discipline of your department on account of similar defaults as well as other faults. However they had no effect on you.
>
> 3 In accordance to the requirement of rule 30(2) of the Rules of Public Officers (Conduct and Discipline) (General Orders Chapter 'D'), you are requested to submit:
>
> (a) your defence to this charge; and
> (b) show cause why you should not be dismissed from service.
>
> Your reasons and submissions must be submitted to the Secretary, Public Services Commission within fourteen (14) days from the date that you received this letter. If you do not reply within this specific duration of time, you are assumed to have no defence and this matter will be decided on the basis of the present evidence against you.

The appellant in due course pursuant to reg 30(2) made a written exculpatory representation giving grounds on which she relied to exculpate herself. By a letter dated 4 March 1980, the appellant was informed by the first respondent that she had been dismissed from service with effect from the receipt of the letter. She was also informed that the first respondent in deciding to dismiss her had given full consideration to her written representation.

We have already dealt with the first ground and we think it would be appropriate to deal next with the last ground of appeal, namely, that the show cause letter included a charge and not the grounds, thereby contravening reg 30(2). With respect to this ground of appeal we would merely say that it appears to be the established practice of the first respondent hitherto to couch the grounds for any proposed dismissal of civil servants in the form of a charge under reg 30(2). It is not something new and peculiarly applicable to the instant case only. Our law reports provide ample evidence that in the past charges were profferred against delinquent civil servants in the case of disciplinary actions. See for example the Privy Council cases of *Kanda* v *Government of the Federation of Malaya*,[1] *R Sambasivam* v *Public Services Commission & Anor*[2] and our own case of *Inspector-General of Police & Anor* v *Alan Noor bin Kamat*.[3] In all these three cases the charges were framed against Kanda, Sambasivam and Alan Noor without challenge from the parties concerned nor any comments at all from the courts on the propriety or otherwise of framing charges under reg 30(2). The use of a charge in disciplinary actions under reg 30(2) concerns matters of form rather than substance and in our view the reference to a charge in the show cause letter did not in any way place the appellant in any disadvantageous position nor was she in any way prevented from furnishing the first respondent with the written representation. In any event, the charge contained all the necessary grounds for the proposed dismissal which enabled the appellant to prepare her written representation accordingly. We did not think this trivial departure was serious enough as to vitiate the decision of the first respondent and render it void and inoperative.

Grounds of appeal no 2 and 3 can be grouped together under breach of the rules of natural justice. Natural justice is a concept which involves common law rules, namely, (a) the right to be heard (audi alteram partem): the principle that a decision-maker must afford an opportunity to be heard to a person whose interests will be adversely affected by the decision, and (b) the rule against bias (nemo debet esse judex in propria sua causa): the principle that a decision-maker must be disinterested or unbiased in the matter to be decided. The classical statement of the fair hearing rule of course comes from the judgment of Lord Loreburn in *Board of Education* v *Rice*[4] at p 182:

> ... they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

With regard to bias, the learned judge dismissed this complaint under this head as he was satisfied there was no evidence to suggest that the first respondent was biased or prejudiced against the appellant, adding that the first respondent was perfectly entitled to take into consideration the appellant's previous conduct. We do not think it necessary to deal with bias as a special ground of appeal because in our view the materials on which the appellant relied to support bias were the same materials to support

the complaint against the breach of the hearing rule which was more relevant in this appeal. These materials ran into one another and it would be more pertinent to deal only with the more weighty ground. For the purpose of this appeal we consider that the main and dominant issue in this appeal that calls for our determination is the breach of the fair hearing rule.

At this juncture we would interpolate to say briefly on the application of the rule of natural justice. The audi alteram partem or hearing rule which Lord Diplock classified as 'procedural impropriety' and which Lord Roskill suggested to be replaced by 'duty to act fairly' in *Council of Civil Services Unions & Ors* v *Minister for the Civil Service*[5] at pp 410–411 and 414, is now a new common law concept introduced in Malaysia. It has been in existence and observed by our courts since the landmark case of *Kanda* v *Government of the Federation of Malaya*[1] and it had already been entrenched, in so far as civil servants are concerned, in art 135(2) of the Federal Constitution and introduced in a statutory form in reg 27 of 1969 Regulations. We can say with confidence that public authorities in Malaysia are now very much aware of these principles and have adhered to them conscientiously. What seems to be the recurring problem, as is illustrated in the present appeal, is their application to a particular case or a situation. The principles can be misconceived in good faith but as far as the court is concerned it would intervene by judicial review if a decision of any administrative tribunal or any administrator was reached in breach of the rules of natural justice. The cases of *Kanda*,[1] *Inspector-General of Police* v *Alan Noor*[3] and *Sambasivam*[2] and *Mahadevan* v *Anandarajan & Ors*[6] are illustrations of the application of these principles.

The core of the appellant's complaint in regard to the breach of the rules of natural justice was the fact that the first respondent, in arriving at its decision to dismiss her from service, took into account extraneous matters, namely, the appellant's record of past conducts which were entered in her record of service and produced by the Director-General of the Government Printers Department, Kuala Lumpur to the first respondent without giving her an opportunity to explain, contradict or rebut them.

The basis of the appellant's contention in this respect was the contents of para (2) of the show cause letter. We are clear in our minds that it was never the appellant's case that this paragraph constituted an additional charge which the appellant was not called upon to explain or exulpate herself from. Learned senior federal counsel, however, did not seem to appreciate the true nature of the appellant's contention. It is not surprising that he argued that the impugned para (2) of the show cause letter should be viewed merely as a warning to the appellant and that it was not the basis of the first respondent's decision or an additional charge. It was meant to serve as a reminder to her of the seriousness of the allegations against her because judging from her written representation she seemed to treat the show cause letter cursorily. Yet, curiously, in the same breath, he conceded that her previous undesirable conducts were taken into account for the purpose of inflicting punishment. Since para (2) was not a charge, the duty to afford her the opportunity to be heard on it did not arise at all. So ran the senior federal counsel's argument. It seemed obvious to us that learned senior federal counsel had palpably erroneously barked the wrong tree. This misconception probably explained why the respondents did not call any witness to controvert the appellant's contention on the irrelevancy of her past conducts for the purpose of the disciplinary action against her.

On a careful analysis of para (2) of the show cause letter, it became evident there was an implicit acknowledgment on the part of the first respondent that it knew of the several disciplinary actions that had been taken against her and the punishments thereof on similar complaints as the one presently before it as well as other charges of misconducts. The informations relating to the previous disciplinary actions were supplied by the Director-General of the Government Printers Department Kuala Lumpur when he submitted the record of service of the appellant to the first respondent and recommended to the first respondent that disciplinary action should be taken against her. A scrutiny of the agreed bundle of documents in the record of appeal revealed that the entries in the appellant's record of service showed that disciplinary actions were taken against her four times for being late to report for duty and three times for taking longer time to complete her work assignments. On these actions she was punished accordingly ranging from a warning, a fine and the withholding of her salary. It is not unreasonable, therefore, to infer that these were the matters referred to in para (2) of the show cause letter which actuated the first respondent to intimate to her through the show cause letter its intention to dismiss her. It did not escape our attention that the last sentence of para (2) of the show cause letter had an ominous ring to it when it said 'However, they had no effect on you.' In fact para (2) of the letter was so written as to reflect the state of mind of the first respondent on the issue of her dismissal.

In our view, para (2) of the show cause letter by itself constituted an intrinsic evidence that the first respondent, though acting perfectly in good faith, had taken these damaging materials into account in deciding to dismiss her, using her previous disciplinary actions and punishments as aggravated circumstances. Armed with the record of all the various disciplinary actions and punishments against her it would seem inevitable and indeed logical under the circumstances for the first respondent to have decisively reached at the determination to dismiss her. It was as if her casual attitude towards her previous disciplinary punishments demonstrated her as an obstinate,

incorrigible and delinquent civil servant and under these circumstances, therefore, we could not see what other decisions the first respondent could otherwise possibly make. The adverse record had sealed her fate as a civil servant. It seemed to us that the grounds for the disciplinary action before the first respondent by themselves were not serious enough to merit a dismissal without taking into account those damaging materials concerning the conduct of the appellant.

With all respect, the learned judge below should not have held that the first respondent was perfectly entitled to take into consideration the appellant's previous conduct without saying further that she must also be provided with an opportunity to explain or contradict them. The record of service as far as the disciplinary action before the first respondent was concerned contained extraneous matters, detrimental to the appellant's case. Even before the case of *Ridge* v *Baldwin*,[7] Lord Denman CJ in *R* v *Smith*[8] in dealing with the case of dismissal of a parish clerk held that even personal knowledge of the offence was no substitute for hearing the officer: his explanation might disprove criminal motive or intent and bring forward other facts in mitigation. We are not saying and should not be quoted as saying that the past record of the appellant should not be taken into account in considering her guilt or the appropriate punishment if she were found guilty of the charge. What we are saying is that if these materials which have such damning effect on her case are to be used against her she should be given a right to be heard on them. It is not a matter of pure technicality but it is absolutely fundamental in law that the appellant should have been given an opportunity of stating her case regarding her past conducts, considering that the dismissal of a civil servant is no light matter.

The matter is not free from authorities and the law on it is well settled. We find support for this proposition in many cases. In the case of *Kanda* v *Government of the Federation of Malaya*[1] Lord Denning at p 172 said:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn LC in *Board of Education* v *Rice* [1911] AC 179 down to the decision of their Lordship's Board in *Ceylon University* v *Fernando* [1960] 1 WLR 223. It follows, of course, that *the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other.* The court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might to do so. The court will not go into the likelihood of prejudice. The risk of it is enough. *No one who has lost a case will believe he has been fairly treated if the other side has access to the judge without his knowing.* (The emphasis is ours.)

The case of *S Nanjundeswar* v *State of Mysore*[9] is also relevant. At p 162 SR Das Gupta CJ says this:

> I now come to the next contention of the learned advocate for the petitioner on which also I hold that this petition should succeed. It was pointed out to us that in making the order of punishment, the government has taken into consideration the previous conduct of the sub-inspector and has observed in its said order that the previous conduct of the sub-inspector was not above board. The learned advocate contended that no notice was given to the petitioner that his previous conduct would be taken into consideration in inflicting the punishment in question. He urged, relying on the said decision of the Supreme Court reported in (S) AIR 1957 SC 882, that principles of natural justice require that no materials should be relied upon against the person charged without his being given an opportunity of explaining them.
>
> Past conduct, according to him, is a material which has been relied upon against the petitioner by the government in imposing the punishment in question and the government could not do so without giving the petitioner an opportunity of explaining the same. The petitioner in this case was not given such opportunity. In my opinion, this contention of the learned advocate is also sound. The observations of their Lordships of the Supreme Court on which reliance has been placed, support this contention of the learned advocate for the petitioner. The petitioner was not given an opportunity of explaining his past conduct. The government, before relying on the said conduct, as it has done, for inflicting the punishment in question should have given the petitioner an opportunity of explaining it.
>
> In this connection, reference may also be made to a decision of the Madhya Pradesh High Court reported in *Ramachandra Gopalrao* v *Deputy Inspector of Police* AIR 1957 Madh para 126. In that case, it was held *that no doubt competent authorities are entitled to take into consideration the record of the past service of a civil servant in order to determine the appropriate punishment, but before taking this into consideration, the civil servant must be apprised of the record of his past service and of the fact that it would be taken into account to decide the question of punishment.* In my opinion therefore, the petitioner's present contention should succeed. (The emphasis is ours.)

The same principle was also adopted in the case of *R* v *Home Secretary, ex p Benwell*[10] where other matters adverse to the applicant were taken into account with which the applicant had either not been charged or which the Code of Disciplinary itself made irrelevant. At p 571 Hodgson J says:

> If, as the applicant says, and as seems likely, he did not communicate with the national press which merely picked up a juicy bit from a local paper, there is nothing to suggest that he initiated the more outrageous comments (as a reference to the report from the 'Tavistock Gazette' will confirm). If he only, as is said in two places, confirmed the result of the ballot, his conduct could hardly be termed heinous. If he said 'Yes' when certain 'rumours' were put to him, it would be worse, but *whatever the truth, to take it into account when he had been neither charged nor told that it was being taken into account nor given any proper opportunity to reply to the accusation, seems to me to be a breach of the rules of natural justice.* (The emphasis is ours.)

Another Indian case is also in point. This is the case of *Ramachandra Gopalrao* v *Deputy Inspector General of Police*[11] where at pp 132-133 Bhutt J says:

> *The applicant was never informed of the fact that the record of his past service and previous complaint against him would be taken into account at the time of considering the punishment to be imposed upon him. This should have been done in order to enable the applicant to take a proper defence against the proposed action of dismissal. No doubt competent authorities are entitled to take into consideration the record of the past service of civil servants in order to determine the appropriate punishment.*
>
> But before taking this into consideration the civil servant must be apprised of the record of his past service and of the fact that it would be taken into account to decide the question of punishment. In *Gopalrao* v *State Government of Madhya Pradesh* AIR 1954 Nag 90 (L), the question in what circumstances the record of a civil servant's past services can be taken into account at the time of determining the punishment consequential to the establishment of a charge against him was considered and it was held:
>
> > 'If the civil servant is not at all apprised of the record of his past service, nor is he informed that it will be taken into account in order to decide the question of punishment, he cannot be deemed to have been given a reasonable opportunity to show cause against the proposed action. Normally, the question of punishment is linked up with the gravity of the charge, and the penalty that is inflicted is proportionate to the guilt.' (The emphasis is ours.)

The case of *Chief Constable of North Wales Police* v *Evans*[12] shows that the courts consistently apply the same principle as is evident from the passage in the judgment of Lord Hailsham of St Marylebone LC at p 144:

> Apart from his self misdirection on the scope of his discretion, in the present case the chief constable clearly admitted in his affidavit that he had taken into account matters concerning the domestic life of the respondent, some of which, if properly put to the respondent, might perhaps, after his explanation had been given and heard, have influenced the decision as to whether the respondent was likely to become an efficient or well-conducted constable. But some of the allegations were plainly erroneous and none, whether erroneous or otherwise, was ever put to the respondent at all in connection with the relevant inquiry, whether at the delegated hearing or otherwise. Moreover, it was conceded by counsel for the chief constable that, at the time of the extremely brief interview at which the decision was made by the chief constable, the chief constable had already made up his mind to dispense with the respondent's services on the basis of the report made to him by the deputy chief constable, and the respondent was given no chance to say anything by way of denial of the facts alleged in the report or in mitigation of them.

Another often quoted case on the same point is the Privy Council case of *Board of Trustees of Maradona Mosque* v *Badiuddin Mahmud & Anor*.[13]

We wish to add that it has been held that tribunals must not continue privately to obtain evidence or other information between the conclusion of the hearing and the making of the decision, without notifying the parties so as to give them an opportunity to make submissions on it. See for example *R* v *Deputy Industrial Injuries Commissioner, ex p Jones*[14] and *Fairmont Investments Ltd* v *Secretary of State for the Environment*.[15]

It was manifestly demonstrated to us that the first respondent had infringed the rule of natural justice in not affording the appellant the opportunity to explain or controvert her record of service which played a part in influencing its decision to impose the severest punishment permissible under the 1969 Regulations. On this ground and based on the authorities we have cited in our judgment we have no alternative but to allow this appeal.

Appeal allowed.

Solicitors: *Karpal Singh & Co.*

Reported by *Prof Ahmad Ibrahim*

Lye Thean Soo & Ors v Syarikat Warsaw

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 410 OF 1985
LEE HUN HOE CJ (BORNEO), HARUN HASHIM AND JEMURI SERJAN SCJJ
17 AUGUST 1990

Land Law — Public right of way — Proof of dedication

The respondents (plaintiffs) in this case were sand mining and sand contractors. They had entered into agreements with various land owners to mine, work and take away sand from their holdings. Entry to their holdings was by way of an access road on a lot which for many years had been reserved for a road and set aside as such and used by the public. Although the lot of land had been surrendered to the government it had not been taken over by the government. The respondents claimed that the appellants (defendants) had wrongfully and maliciously conspired and combined among themselves to injure their business by obstructing the access road and preventing their lorries and other vehicles transporting sand from going in and out of the holdings. The appellants denied the claim. The appellants had applied for subdivision of the lands in 1957. The third appellant retained the lot of land on which the road was and said he had granted the right of entry to the lot only with his consent. Before the judge of the High Court, two issues were agreed — (i) was the lot a public highway prior to 1957? and (ii) was the lot a public highway after 1957? The learned trial judge gave judgment for the respondents. The appellants appealed.

Held, dismissing the appeal:

(1) Apart from legislation, dedication is also a method by which a right of way may be created.

(2) In this case the path has been used by the public, particularly those living in the vicinity for many years, even before the third appellant acquired ownership of the land, without interruption. He had taken no steps to ensure that a